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Human Rights Board of Inquiry

Annual Report

1995-1996

BOARD OF INQUIRY (*Human Rights Code*)

1995 -96 ANNUAL REPORT

MANDATE

1995-96 marks the first full year of operation of the Board of Inquiry (the Board) as a standing administrative tribunal comprised of a Chair and full and part-time panel members appointed by the Lieutenant-Governor in Council. The Board is the adjudicative agency empowered by the Legislature to hear complaints alleging violations of the *Human Rights Code* R.S.O. 1990, c.H. 19 as amended (*the Code*). The amendments to the *Code* creating the Board as a standing tribunal were proclaimed in force on April 17, 1995.

Where the Human Rights Commission considers it appropriate, it refers complaints for hearing by the Board of Inquiry. The Board is mandated to hold impartial hearings into complaints of infringement of the *Code*. Upon receipt of a referral, the Chair of the Board assigns one or more of the full or part-time panel members to hear the complaint. As a quasi-judicial body, the Board is independent of the Human Rights Commission, the Minister of Citizenship and the Government of Ontario.

The Tribunals' Office provides administrative support to the Board and to the Pay Equity Hearings Tribunal. Full-time panel members of the Board are cross-appointed as Vice-Chairpersons of the Pay Equity Hearings Tribunal. The Tribunals' Office functions as an administrative merger governed by a Memorandum of Understanding signed by the Ministries of Citizenship and Labour. It is independent of both Ministries and attempts to realize administrative and fiscal efficiencies through the sharing of personnel and other resources.

REPORT OF CHAIRPERSON GERRY MCNEILLY

The Board's objective in its first year of operation has been to lay the groundwork for a more efficient and effective hearing process. To that end, I am pleased to report that the use of a panel of qualified, full-time adjudicators has allowed the Board to vastly improve its record for the timely resolution of complaints. This improvement is apparent notwithstanding the fact that the litigation of human rights complaints is becoming increasingly complex and legalistic. During its first year, the Board issued a number of important interim decisions on both substantive and procedural questions. The Board's process and jurisdiction has also been the subject of an increased number of judicial review challenges before the Divisional Court, only one of which was partially successful. I intend to continue to look for ways to improve the Board's level of service to the user community while maintaining the quality and consistency of the Board's decision-making.



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I am proud of the quality of the adjudicators, both full and part-time, appointed by the Lieutenant-Governor in Council to the Board. Their selection followed a rigorous public search and interview process. The panel members combine a valuable range of expertise and experiences in the fields of law, human rights, equality rights, advocacy, community development and adjudication. Equally significant, the panel is reflective of the diversity of Ontario society in the late twentieth century. I continue to look forward to working with the panel members as we carry out the Board's mandate.

A list of the Board's members is attached as **Appendix A**.

Some significant financial and other developments:

- the repeal of the *Employment Equity Act* brought many changes and budget reduction to the Tribunals' Office, the provider of administrative support services to the Board of Inquiry. Acting Registrar, Jim Curren, returned to his position at the Environmental Assessment Board and the decision was made not to replace him in that position but to continue with the Deputy Registrar, Ayumi Bailly, performing the hearing related functions of the Registrar's office while the Chairs of the Board and the Pay Equity Hearings Tribunal assumed the Registrar's management responsibilities;
- negotiations with QL Systems (quicklaw judgments database) commenced and it is hoped that, by the end of the 1996 fiscal year, all Board of Inquiry decisions will be available to researchers and members of the legal community through this service;
- vice-chairs and counsel now act as mediators in human rights complaint and the planned hiring of mediators was abandoned. Virtually all complaints are referred to mediation on consent of the parties, thus reducing the number of cases that proceed to a full hearing on the merits;
- the *Code* requirement to record all hearings was repealed and thus court reporting expenses are now avoided; all hearing rooms have been equipped with court recording devices to be used to accommodate / supplement the note-taking capacity of adjudicator, counsel or parties;
- in August 1995, the Board issued Interim Rules of Practice. The Board intends to use the first year of the Rules' operation as a trial period and to seek advice and comment from members of the user community. It is hoped that the creation and application of Rules will allow for a better understanding of the hearings process in the user community, less hearing days per case as a result of clear disclosure requirements, and greater consistency in rulings on procedural matters; and,
- full-time panel member Randy Mazza was appointed a Justice of the Ontario Unified Family Court and left the Board in December 1995 to assume his new responsibilities. As part of the Government's downsizing and restructuring, this vacated position was eliminated.

CASELOAD

Referrals

During the 1995-96 fiscal year, 55 complaints were referred to the Board of Inquiry. This is significantly more than the number of referrals received in the previous fiscal year (37) and is consistent with the average number of yearly referrals (46) to the Board during the four fiscal year period 1987-1991. The 1995-96 referrals nonetheless represent a significant decline from the number of referrals in more recent fiscal years 1992-1994, when 227 and 70 cases respectively were referred in connection with the Human Rights Commission's "backlog clearance project".

At the start of the 1995 fiscal period, 78 complaints were carried forward from the previous year, and with 55 new referrals, a total of 133 complaints were administered during the 1995-96 period. At the end of the fiscal period, 69 complaints (53% of caseload) were carried forward into the 1996-97 fiscal year.

Panel Assignment

Of the 78 cases carried forward to 1995-96, 67 had been assigned to part-time panel members for hearing. On the other hand, all new cases during 1995 were assigned to full-time panel members. It is anticipated that this change in panel assignment will result in more timely hearings and decisions, improved consistency in decisions and costs savings to the Board.

Mediation

Consensual mediation continues to be an important part of the Board's process. It was introduced in Spring 1993 and over the next two years, settlement rates of 60% were achieved *among those cases referred to mediation*. Prior to 1995-96, only selected cases were referred to mediation while nowadays, mediation is offered to all parties and only rarely is it declined. During this fiscal year, approximately 32% of the Board's caseload were settled before or during the hearing.

A closer look at this figure indicates that, of the complaints referred during 1995-1996, 25% settled during the same fiscal year while 37% of complaints that were carried over from previous years settled. It appears from this break-down that carried-over "older" cases settled more frequently than the more recently referred cases.

The change in the rate of settlement (from 60% of selected cases during 1994-95 to 32% of all cases in 1995-96) might be related to two factors: the Human Rights Commission backlog clearance project referred to above and increased use of other means of case disposition by the Commission. The complaints referred from the backlog, were on the whole, significantly "older" than the complaints

that were referred in the 1995-96 year. In the current as well as previous years, it has been observed that “older” complaints are more likely to settle than “fresh” complaints. Furthermore, I n public statements during the 1995-96 period, the Commission indicated that it intended to rely on mediation, defer to other Acts or fora to deal with a complaint and to implement other strategies to achieve timely disposition of complaints. It now appears that the complaints currently referred by the Commission to the Board are less amenable to settlement than formerly. The Board anticipates a levelling off of settlement rate at around 32%, the average rate achieved in 1995-1996.

Finally, during 1995-96, twice as many cases were settled (43) than were decided on the merits (19). This is merely a “snapshot” and is not necessarily a good predictor for future years. Note also that despite the level of settlement and the commitment to hear complaints in a timely manner, just over half of the cases are carried into the next fiscal period for resolution.

Although the majority of cases no longer settle, mediation nonetheless provides an opportunity to address procedural issues and thereby save hearing time. In our view, the continuing success of the Board’s mediation initiative, reflected in sheer numbers and the size of settlement sums, is attributable to the fact that the Board’s mediators are true neutrals to the dispute from whom parties can receive a neutral evaluation of the strengths and weaknesses of their cases.

Decisions and decision release timelines

Of the total caseload of 133 complaints, 47% were concluded by way of an order confirming settlement or by final decision. The Board issued 19 final decisions after a full hearing of the merits of the complaints an another 21 interim decisions on procedural and substantive matters. Even though *ad hoc* adjudicators continued to decide most cases in 1995-96, 85% of decisions were released within seven (7)months of the final day of hearing. The newly appointed adjudicators serving the Board did not have a backlog of cases or prior decisions and thus, were able to deliver their decisions in a timely manner.

Lapsed time between hearing and decision release

Prior to 1995, hearings were exclusively conducted by part-time members, and while the majority of members completed their decision writing within six (6) months, some decisions were outstanding for over two years after the last date of hearing. For pre-1995 years, information regarding the lapse between the last hearing date and decision is incomplete. It is thus difficult to conduct a strict comparison of the timeliness of decision writing for the pre-1995 and post-1995 periods.

On the overall timeliness of the 19 decisions released in 1995-96: 21% of decisions were issued within nine (9) weeks of the last hearing date; 32% within 10 - 20 weeks; and, another 32% within 21 - 35 weeks. Only three (3) cases, representing 16% of decisions, were outstanding for over one year. These latter three cases were presided over by *ad hoc* appointees.

Of the 19 final decisions issued by the Board during the 1995 fiscal year, only two (2) related to complaints that were referred during the same year. These two hearings were conducted by full-time adjudicators and the decisions were issued within nine (9) weeks of the final day of hearing. Only in two other instances did *ad hoc* adjudicators match this time frame for issuing a decision on the merits. While this is a small sample size from which to draw reliable inferences, it is expected that some efficiency will be achieved with the use of full time adjudicators compared to the former system *ad hoc* Ministerial appointees.

Outlook

The current Board, staffed with full-time salaried adjudicators, is committed to reducing the time taken to produce a final decision after a hearing of the merits of a complaint. The timeliness of decision writing is one measure of the Board's service delivery that will be revisited in the next annual report when a larger sample size becomes available for a truer comparison to be made between full-time and *ad hoc* adjudicators.

Caseload statistics are set out in greater detail in **Appendix B**.

SIGNIFICANT DECISIONS

Summaries of important decisions released in 1995-96 by the Board of Inquiry are set out below.

1. Ontario Human Rights Commission and Martin Entrop v. Imperial Oil Limited (Backhouse) June 23, 1995

Interim Decision #6 - Conclusion of Phase 1 of Inquiry *Discrimination in Employment - Handicap, Perceived Handicap*

The complainant was employed in a safety sensitive position at the respondent's Sarnia refinery. In 1992 the respondent implemented a new drug and alcohol policy which required individuals employed in such positions to disclose any present or past drug or alcohol abuse problems to management. Failure to disclose could result in discipline including termination of employment. The complainant had a past alcohol problem but had abstained from use of alcohol since 1984. Nonetheless he felt obliged by the terms of the policy to disclose his past history to the respondent. Upon disclosure the complainant was removed from his position and reassigned to different, less-desirable, position at no loss in pay.

The policy was eventually changed to include possibility of reinstatement to a safety sensitive position. Candidates for reinstatement were required to undergo a rigorous medical and psychological assessment process which, in the complainant's case, included six separate medical evaluations. The complainant was diagnosed as having "alcohol dependence in remission" and the respondent was advised that there were no psychological or psychiatric reasons to prevent the complainant from resuming his full duties. The respondent advised the complainant that he would be reinstated to his position upon his agreeing to an undertaking which included unannounced alcohol testing twice a quarter, an annual medical screening, and quarterly meetings with his supervisor to review his performance. The complainant signed this undertaking.

In view of the complainant's continued sobriety the respondent reviewed the original undertaking in 1995 and modified its terms to delete the additional unannounced alcohol tests and yearly medical exam (the complainant remained subject to unannounced testing required of all employees) as well as quarterly performance reviews.

After hearing extensive expert evidence on the nature of alcoholism, alcohol dependency and alcoholism in remission the Board concluded that alcoholism/alcoholism in remission is an illness or disease creating physical disability or mental impairment. As such it fits within the definition of handicap contained in the *Code*. Past alcoholism is caught by the definition of handicap particularly where an individual continues to be perceived as addicted or dependent. The Board dismisses the argument that s.10(1) requires handicap to be "ongoing" or that it be a condition beyond the complainant's control.

The Board found three *prima facie* violations of the *Code*: 1) the obligation to self-disclose; 2) removal from the job; and 3) a reinstatement process requiring on-going controls. The Board accepted that the Respondent had created the policy in good faith as part of a comprehensive risk management system. However, expert evidence before the Board suggested that, for an individual with the complainant's history, the risk of relapse into alcohol abuse was very low. The risk being so low the Board had no difficulty in concluding that the respondent's treatment of him under the policy was objectively unjustified. Thus the Board found that the respondent failed to meet the second branch of the s.17(1) defence.

The Board went on to conclude that, based on the expert evidence, the requirement for mandatory self-disclosure, automatic reassignment and reinstatement pursuant to the specific controls first imposed upon the complainant, did not meet the requirements of s. 17(2). Other less intrusive means were available and were potentially more effective in permitting the respondent to meet its legitimate safety objectives.

2. Ontario Human Rights Commission, Diana Parsonage, Corporate Cuisine and Canadian Tire Corporation and Clyde Vieira

(House) November 1, 1995

Discrimination in Contract - Association with Person Identified by Race, Colour, Ancestry and Ethnic Origin

The Complainant obtained a contract for the provision of cafeteria services at the Corporate Respondent's Distribution Centre. The Corporate Respondent subsequently cancelled the contract and the Complainant alleges that the cancellation occurred because she had employed a black man as manager of her operation. The Complainant alleged that several incidents of harassment and discrimination had been directed toward her employee prior to the cancellation of the contract.

The Board dismisses the complaint. The Board does find that an incident, involving a "joke" with a racist punch line, did occur. However, the Board rules that a single improper and insulting joke, told by employees on their lunch break and not shown to have been directed at any one individual, does not constitute a violation of the *Code*. The Board further concludes that, even if he had found the joke to have been a breach of the *Code*, there was no evidence to connect it to the decision to terminate the contract with the Complainant. Having found a racist incident to have occurred, the Respondents' request for costs was denied.

3. Ontario Human Rights Commission, Brad Thomson and 501781 Ontario Limited operating as Fleetwood Ambulance Service, Ontario Public Service Employees Union

(Laird) November 10, 1995

Discrimination in Employment - Handicap

This complaint involves a challenge to a collective agreement provision which pro-rates vacation entitlement where an employee is absent from work for a "whole month" for any reason other than vacation or a specified paid leave. The Complainant was absent from work for periods over a month between 1989 through 1991 as a result of workplace injuries compensable under the *Workers' Compensation Act*.

The Board upholds the complaint. On the facts there was no dispute that the Complainant had a handicap within the meaning of the *Code*. The Board rejects the Respondent employer's argument that, because the entitlement to vacation is an earned benefit based on time at work, the Complainant cannot suffer any adverse impact because he has no right to vacation accrual while absent from work. The Board concluded that the *Code* makes no distinction between prospective losses and those which affect fully accrued rights. The proximate cause of the Complainant's absence was his handicap and, therefore, the loss of vacation entitlement was connected with a ground protected by the *Code*. For the purposes of the disparate impact analysis, the Board concludes that the appropriate comparator for the Complainant is the bargaining unit as a whole. To otherwise restrict the comparison to

employees on unpaid leave would ignore the proximate cause of the differential treatment. As compared with other employees, the negative impact on the Complainant is found to be disparate based on the involuntary nature of his absence from work and the very significant loss of vacation entitlement. The Board rejects the Respondent employer's section 17 defence on the basis that accommodation was irrelevant to the issues in dispute. The Board refuses to find the Respondent Union liable noting that it actively sought deletion of the impugned provision in the collective agreement over the years and in more than one forum. The Board ordered the Respondent employer to cease applying the provision of the collective agreement to calculation vacation entitlement for employees absent from work as the result of injury or disability for which workers' compensation benefits were received.

4. Ontario Human Rights Commission Keltie Jones and Highmark Properties (MacNaughton) November 16, 1995

Breach of Settlement - Jurisdiction

The Complainant alleged that the Respondent had resiled from the terms of its settlement with the Commission and sought enforcement pursuant to section 43 of the *Code*. The Commission investigated and referred the matter to the Board of Inquiry. Subsequent to the referral, counsel for the Commission advised that she was unable to provide proof of the Commission's approval of the settlement. The Respondent then brought a motion seeking dismissal of the proceedings on the basis that approval of a settlement by the Commission was a necessary precondition to enforcement and, absent approval, the Board did not have jurisdiction to hear the matter. The Complainant argued that the settlement had been approved and sought to lead evidence to establish this. The Board permitted evidence to be led on this issue only.

The evidence disclosed that the settlement in this matter had been internally categorised as falling within the "Administrative Approval" group and, as such, had been deemed by the Commission as one which could be approved by the Commission's Regional Manager rather than the Commissioners. The *Code* is silent on the means by which settlements may be approved. Section 43 speaks only to the enforcement of settlements and, the Board noted, enforcement of only those settlements approved "by the Commission". The *Code* defines the Commission in s. 27(1) as being made up of persons appointed by the Lieutenant-Governor in Council. There is no statutory provision for delegation of the settlement approval authority to members of the Commission's staff. Without an approved settlement to enforce, the s.43 hearing could not proceed and the Board dismissed the complaint.

APPENDIX A: BOARD OF INQUIRY 1995-1996

CHAIR

Gerry K. McNeilly

FULL-TIME MEMBERS

Kathy Laird
Heather MacNaughton
Mary Anne McKellar
Randy Mazza
Mary Woo Sims
Sri-Guggan Sri-Skanda-Rajah

PART- TIME MEMBERS

Naresh Chand Agarwal	Margaret Parsons
Arjun P. Aggarwal	Michel Georges Picher
Constance Backhouse	W. Gunther Plaut
Harold A. Bassford	Frederika M. Rotter
Anne F. Bayefsky	Nelson Rubio
Elizabeth Beckett	Etienne Saint-Aubin
Kim S. Bernhardt	Sil Salvaterra
Allan Rodney Bobiwash	Lorne Slotnick
T. Brettel Dawson	Ian Springate
Lawrence G. Euteneier	Frederick H. Zemans
Godwin E. Friday	
Murthy V.S. Ghandikota	
Kirk D. Goodtrack	
Ruth Hartman	
Jeffry A. House	
H. Albert Hubbard	
Diana Jardine	
Deborah J. D. Leighton	
Janet Lum	
Allan Manson	
Ronald McInnes	
Errol P. Mendes	
Loretta Mikus	

APPENDIX B: CASELOAD STATISTICS

- Number of Active Complaints carried forward March 31, 1995.. 78
- Number of Complaints Received in 1995-96: 55
- Number of Decisions Issued: 40
 - Breakdown of Decisions:

19	final decisions (on merits)
2	withdrawal/ dismissal
43	orders on settlement
19	interim decisions
 - Breakdown of cases referred by Provision:

Employment	82%
Accommodation	11%
Services	7%
Facilities	0%
 - Breakdown of cases referred by Ground*:

Handicap/Disability	31%
Sex	30%
Age	21%
Race	7%
Others	12%
- Number of Active Complaints as of March 31, 199669

* Note that there is usually more than one stated ground per complaint and as such, attempts have been made to isolate primary and secondary grounds.

